Supreme Court, U.S.
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No. 92-1088

In The

Supreme Court of the United States

October Term, 1992

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,

Petitioner,

v.

STATE OF SOUTH CAROLINA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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I. THE LAW OF THE CASE DISPOSES OF RESPONDENTS' ARGUMENT THAT THE TRIBE'S "KNOWLEDGE" OF RESPONDENTS' PURPORTED ADVERSE POSSESSION RELIEVES THEM OF THE BURDEN OF PROVING THE ELEMENTS OF ADVERSE POSSESSION.

Respondents inaccurately characterize the Tribe's complaint in this action as admitting actual notice of their adverse holding, thereby relieving respondents of the requirement of showing open, hostile, continuous and notorious possession. Opp. Br. at 10-11. This same argument was made by respondents and rejected by the Court of Appeals in *Catawba Indian Tribe of South Carolina v. State of South Carolina*, 865 F.2d 1444 (4th Cir. 1989) (*en banc*), *cert. denied*, 491 U.S. 906 (1989).

> The state, however, contends that inasmuch as the tribe acknowledges that it has not been in possession of the land since 1840, this judicial admission precludes it from relying on the presumption [of possession] . . . .
>
> Section 15-67-210 does not require a plaintiff to show both legal title and possession . . . . True, the presumption of possession is not conclusive. It can be rebutted, and the statute expressly states how it can be rebutted. Rebuttal may be accomplished according to the terms of the statute by showing "such premises have been held and possessed adversely to such legal title for ten years before the commencement of the action." *The statute does not allow rebuttal by simply showing that the plaintiff has not been in possession or that the plaintiff has admitted lack of possession.*

Id. at 1452 (emphasis added).

In fact, the complaint herein does no more than allege the historical facts giving rise to the claim of Indian title and allege that "defendants . . . claim an interest in or ownership to a portion of the subject lands and are keeping plaintiff out of possession of its lands . . . . " Complaint, ¶ 22 at 6. These allegations of dispossession, stated in the present tense,[1] give rise to no inference of actual knowledge by the Tribe of the adverse possession of these particular claimants, or the specific predecessors through whom they claim, during any particular time period. The Tribe's allegations merely preserve its claim to trespass damages against whichever parties it proves were wrongfully in possession of its property for whatever time period they are proven to have been in wrongful possession.

The Catawba Indian Tribe has never acquiesced in or conceded its wrongful dispossession by the State and respondents' predecessors. For 150 years, the Tribe has persistently sought redress from the State and Federal governments. *See South Carolina v. Catawba Indian Tribe,* 476 U.S. 498, 504-505 (1986) (Blackmun, J., dissenting).

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[1] Respondents' assertion that the Tribe has alleged that respondents "committed 'trespass . . . for the entire period of their dispossession' . . . " is misleading. Opp. Br. at 10. Respondents' artful use of ellipses distorts the quoted phrase. In fact, the Tribe's prayer simply seeks "trespass damages, including the amount of the fair rental value and profits for each portion of the subject land claimed by any defendant for the entire period of plaintiff's dispossession. . . . " Complaint, ¶ 4 at 7. This prayer plainly seeks recovery only for the period of the Tribe's dispossession by that defendant.

II. NEITHER RULE 701 NOR 704 FED. R. EVID. SANCTIONS A BARE ASSERTION OF ULTIMATE FACT TO ESTABLISH A *PRIMA FACIE* CASE.

Respondents mistakenly argue that the Federal Rules of Evidence sanction conclusory testimony by a claimant to establish adverse possession. Opp. Br. at 9. This argument ignores the applicable substantive adverse possession of law of South Carolina which requires that adverse possession be proven by showing the existence of specific acts of possession justifying such a finding. *Weston v. Morgan*, 162 S.C. 177, 160 S.E. 436 (1936); *Dickson v. Epps*, 104 S.C. 381, 89 S.E. 354 (1916); *Mahoney v. Southern Railway Carolina Div.*, 82 S.C. 215, 64 S.E. 228 (1909); *Burnett v. Crawford*, 50 S.C. 161, 27 S.E. 645 (1897); *Fore v. Berry*, 94 S.C. 71, 78 S.E. 706 (1913) (rejecting testimony that property had been possessed openly, adversely and exclusively because it stated conclusions of law and was too general to warrant a finding of adverse possession).

The Federal Rules of Evidence do not aid respondents' argument. While lay opinions and opinions on the ultimate issue are allowed, under certain circumstances, by Rules 701 and 704, conclusory averments, standing alone, do not satisfy a movant's burden under Rule 56. *See Maldonado v. Ramirez*, 757 F.2d 48, 51 (3d Cir. 1985); *Leonard v. Dixie Well Service & Supply, Inc.*, 828 F.2d 291, 295 (5th Cir. 1987); *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984). This is particularly so when the terms used by the witness have a "separate, distinct and specialized meaning in the law different from that present in the vernacular. If they do, exclusion is appropriate." *Torres v. County of Oakland*, 758 F.2d 147, 151 (6th Cir. 1985). In this case the elements of adverse possession set

forth under South Carolina adverse possession law plainly have special legal meaning peculiar to that context.[2]

Neither the substantive law of South Carolina, the Federal Rules of Evidence nor the Federal Rules of Civil

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[2] Testimony in the form of opinions or inferences are allowed by laymen under the Federal Rules of Evidence only when "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Rule 701 Fed. R. Evid. In this case, the affidavits submitted by respondents simply recite the elements of adverse possession and, for the most part, present nothing by way of evidentiary fact. As such they have no value in aiding the jury to understand testimony. Such assertions "amount to little more than choosing up sides, and exclusion for lack of helpfulness is called for by the rule." Advisory Committee's Note to Fed. R. Evid. 701.

In addition, the Advisory Committee's Notes to Rule 704 Fed. R. Evid. state that the helpfulness provisions "afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria." *See United States v. Cecil*, 836 F.2d 1431 (4th Cir. 1988).

Procedure sanction respondents' use of conclusory affidavits to support a judgment on adverse possession.

Dated this 26th day of February, 1993.

Respectfully submitted,

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